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MARITAL PROPERTY DISTRIBUTION: LEGAL AND EMOTIONAL CONSIDERATIONS

NORMAN PERLBERGER†

I. PSYCHOLOGICAL AND EMOTIONAL CONSIDERATIONS

AFTER THE TEARS AND SLEEPLESS NIGHTS, the obligatory talk with the kids, and the smothering comfort of well-wishers, inevitably comes one's confrontation with the future. There is often a sudden awareness that, while the spiritual body of the marriage has shattered, the security and permanence of the material objects acquired during marriage still remain. Correspondingly, a sense of foreboding and insecurity accompanies the prospect of dividing the marital estate, thereby stripping the family unit of its material stability.

How the client approaches this phase of the divorce process depends, of course, on the individual.¹ Many view the property symbolically and their responses to its division can be predicted from their basic approach to life. My experiences have taught me that the attorney can expect one of three reactions from the divorcing client. If the individual is able to live independently, the property demands can range from a reasonable request for an equal split of joint assets to the overreaction and extremism of proclaiming to want nothing. If the individual is dependent and insecure, the demands will be for a greater portion of the tangible property in order to restore security. For example, such an individual might unhesitatingly give up a claim to shares of stock, yet insist that the dining room set remain undisturbed in the family home. Finally, if the individual is an avenger, although not motivated by greed or security concerns, he or she may view the property division as a formidable battleground where emotional defeat can be replaced by financial victory. This third kind of litigant commonly identifies a single item as a focus for combat and refuses to yield, bargain, or consider substitutes of equal or greater value.

In the final analysis, however, the divorce process is more a matter of material considerations than a resolution of symbolic concerns.

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1. For an extensive discussion of the psychological aspects of the divorce process, see Kaslow, *Stages of Divorce: A Psychological Perspective*, *Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 718 (1980).

For the attorney, valuation predominates over psychological evaluation. Yet, the sensitive and perceptive practitioner can accomplish material objectives within reasonable limits while also identifying the emotional forces involved; in so doing, he or she may be successful in assuaging the client's pain.

Thus, before the practitioner can serve the client's economic needs, it is important for him not only to be versed in the law but also to have an understanding of the impact of divorce on the family.² While there exists a heated debate as to whether or not an attorney should attempt to act as a counselor,³ it is doubtful that an attorney can practice family law effectively while lacking knowledge of the dynamics of the divorce process. The lawyer does a disservice to his client's psychological well-being, as well as to the legal profession in general, if he permits the divorce process to become a forum for venting the anger and frustration of a broken marriage.⁴

The lawyer must remain calm amidst heated passions. To serve the client well, the practitioner must have an understanding of the nonlegal intricacies of divorce as well as a total familiarity with the applicable law. Thus, this article begins with a brief discussion of the emotional or psychological stages of the divorce process⁵ and proceeds to review the law of property distribution in Pennsylvania.⁶ It is hoped that this format will provide a framework upon which the practitioner can sensitively apply the pertinent legal principles.

II. THE STAGES OF DIVORCE

In a remarkable book entitled *On Death and Dying*,⁷ Elisabeth Kübler-Ross identifies and analyzes five stages⁸ through which individuals pass in dealing with their own death or with the death of a close friend or relative. Those stages are as follows: first, denial and

2. See *id.* at 718-20, 730-40.

3. For a discussion of the role of the attorney in the area of matrimonial disputes, see Turner, *The Role of the Lawyer in Matrimonial Cases, Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 676 (1980). See also Callner, *Boundaries of the Divorce Lawyer's Role*, 10 FAM. L.Q. 389, 391-94 (1977); Fain, *The Role and Responsibility of the Lawyer in Custody Cases*, 1 FAM. L.Q., Sept. 1967, at 36, 39-46; Kargman, *The Lawyer's Role in Divorce Reconciliation*, 6 PRAC. LAW, Mar. 1960, at 21; Merder, *The Need for an Expanded Role for the Attorney in Divorce Counseling*, 4 FAM. L.Q. 280 (1970).

4. See Beatrice, *Divorce: Problems, Goals and Growth Facilitation*, 60 J. CONTEMP. SOC. WORK, Mar. 1979, at 157, 158.

5. See notes 7-27 and accompanying text *infra*.

6. See notes 28-96 and accompanying text *infra*.

7. E. KÜBLER-ROSS, *ON DEATH AND DYING* (1969).

8. For examples of other stage theories, see Kaslow, *supra* note 1, at 720-51.

isolation;⁹ second, anger;¹⁰ third, bargaining;¹¹ fourth, depression;¹² and fifth, acceptance.¹³ The stages of divorce are perceived by this author as identical to those which Kübler-Ross associates with death.¹⁴ Divorce, after all, is the death of a family unit.¹⁵ The married person was someone else; the separated or divorced person is a new entity.¹⁶ One important period of the individual's life is forever dead. It is hoped that, by examining Kübler-Ross' stages of adjustment to death, the practitioner will be better prepared to understand the divorcing client who is going through much the same process.

A. Denial and Isolation

This stage involves the victim's initial shock and disbelief that death is approaching or has occurred to someone dear.¹⁷ Denial is accompanied by isolation characterized by an unwillingness to discuss the topic with others.¹⁸ Similarly, the divorce victim often presents himself or herself in a state of psychological and emotional shock. The client disbelieves his or her own situation and often remarks to the practitioner that it is impossible for an attorney to imagine how the client feels.

B. Anger

Denial is often replaced by anger and resentment.¹⁹ According to Kübler-Ross, the dying patient typically displays this anger at ran-

9. See E. KÜBLER-ROSS, *supra* note 7, at 34-43; notes 17-18 and accompanying text *infra*.

10. See E. KÜBLER-ROSS, *supra* note 7, at 44-71; notes 19-20 and accompanying text *infra*.

11. See E. KÜBLER-ROSS, *supra* note 7, at 72-74; notes 21-22 and accompanying text *infra*.

12. See E. KÜBLER-ROSS, *supra* note 7, at 75-98; notes 23-24 and accompanying text *infra*.

13. See E. KÜBLER-ROSS, *supra* note 7, at 99-121; notes 25-27 and accompanying text *infra*.

14. See E. KÜBLER-ROSS, *supra* note 7, at 3. Kübler-Ross herself recognized the comparison between death and divorce:

It is well to remember that the child will react in the same manner [as he does on the death of a parent] if he loses a parent by divorce, separation, or desertion. Death is often seen by a child as an impermanent thing and has therefore little distinction from a divorce in which he may have an opportunity to see a parent again.

Id. (emphasis added). For other analogies of the Kübler-Ross theory to divorce, see Beatrice, *supra* note 4, at 160; Froiland & Hozman, *Counseling for Constructive Divorce*, 55 PERSONNEL AND GUIDANCE J. 525 (1977). For a variation on this theory, see Wiseman, *Crisis Theory and the Process of Divorce*, 56 SOC. CASEWORK 205 (1975). Wiseman combines the Kübler-Ross theory with the process of "rejection of the lost object and acceptance of new patterns of living" peculiar in the divorce context to arrive at five modified stages: 1) denial; 2) loss and depression; 3) anger and ambivalence; 4) reorientation of lifestyle and identity; and 5) acceptance and integration. *Id.* at 206.

15. See Froiland & Hozman, *supra* note 14, at 525.

16. See Wiseman, *supra* note 14, at 209-12.

17. E. KÜBLER-ROSS, *supra* note 7, at 34-43.

18. *Id.*

19. *Id.* at 44.

dom.²⁰ By contrast, it is my experience that the client involved in a divorce proceeding tends to focus his or her anger on the other spouse by seeking retribution.

C. *Bargaining*

This stage is identified by the patient rationalizing an eventual cure or possible postponement of the terminal illness.²¹ In the divorce process, bargaining may manifest itself by the client's expressed hopes of, or actual attempts at, reconciliation.²² Sometimes, an oppressive amount of litigation or negotiation is initiated in an effort to bring the reluctant spouse to his or her senses. If the attempt at reconciliation fails, the externalized anger associated with stage two is often exacerbated.

D. *Depression*

In death or divorce, this stage follows the recognition that the end of life or marriage is inevitable.²³ It is a period marked by profound withdrawal, self-pity, a poor sense of self-identity, and chronic despair.²⁴

E. *Acceptance*

Kübler-Ross observed that the dying patient ultimately accepts the inevitable and seeks to spend his or her remaining days in peace.²⁵ This internal harmony is the healthy consequence of having passed through the other four stages.²⁶ The survivor of a loved one's death learns to continue living and finds that good can follow tragedy. In the divorce process, the spouses often reach an agreement on all marital issues and proceed to an uncontested divorce. In this way, the parties eventually come to accept the divorce and begin to rebuild their lives.²⁷

20. *Id.*

21. *Id.* at 73.

22. See Froiland & Hozman, *supra* note 14, at 527.

23. E. KÜBLER-ROSS, *supra* note 7, at 76. Kübler-Ross identifies this kind of depression as preparatory, not reactive, because it "does not occur as a result of a past loss but is taking into account impending losses." *Id.* According to Kübler-Ross, the individual should be allowed to express his or her sorrow, rather than be discouraged from doing so through reassurances. *Id.* at 77.

24. See Froiland & Hozman, *supra* note 14, at 528-29.

25. See E. KÜBLER-ROSS, *supra* note 7, at 99-101.

26. *Id.*

27. See Beatrice, *supra* note 4, at 157.

Recognition of these emotional or psychological stages is important for a lawyer engaged in divorce representation. It is important to note, however, that the attorney's involvement in the process does not always begin at stage one. The client may consult the attorney for the first time during any one of the stages. New clients will be seen in deep shock and uncertain of their futures (stage one), revengeful and defensive about their contributions to the marital breakdown (stage two), anxious to reconcile and insistent that divorce is not on their minds (stage three), terribly bereft with a low sense of self-esteem (stage four), or ready for a quick and painless divorce (stage five). Having provided the reader with an overview of the complexity of the emotional element, this article will now shift its focus to the legal principles which control the possibility of success in negotiations and the courtroom.

III. APPLICABLE LEGAL PRINCIPLES

A. Societal and Historical Prejudices

1. Wife as Chattel

At common law, a wife was regarded as her husband's property, a mere chattel.²⁸ This status was soundly criticized in *Neuberg v. Bobowicz*,²⁹ where the Supreme Court of Pennsylvania refused to extend to wives the right to recover on a cause of action for loss of consortium.³⁰ The *Neuberg* court held that this right of recovery, which is based on the concept of the wife as chattel,³¹ is an anachronism without present day justification, and therefore, should not be extended.³²

In addition to judicial action such as *Neuberg*, the Pennsylvania Legislature has enacted a series of statutes, starting with the Married

28. See *Neuberg v. Bobowicz*, 401 Pa. 146, 150, 162 A.2d 662, 664 (1960). Reviewing this traditional relationship between husband and wife, the *Neuberg* court stated:

In effect, the woman spouse was her husband's chattel, his property. She owed him duties much the same as did a servant his master. If he by injury to her suffered a loss of some feudal service owing to him by her, he and he alone—for she was too inferior a subject to have any such right, much less the privilege to assert it—was allowed to sue to recover, just as he would sue for injuries done to his cattle.

Id. at 150, 162 A.2d at 663-64.

29. 401 Pa. 146, 162 A.2d 662 (1960).

30. *Id.* at 150-58, 162 A.2d at 664-67.

31. See note 28 and accompanying text *supra*.

32. *Id.* The court intimated that if the issue had been presented, it would also have voided the husband's right to recover under this "embarrassing left-over from another day and age." *Id.* at 154-55, 162 A.2d at 666 (dictum).

Women's Acts at the turn of the century³³ and culminating in the equal rights amendment (ERA) to the Pennsylvania Constitution in 1971,³⁴ which have ultimately eradicated the wife's common law subservient status. The Pennsylvania Supreme Court, in numerous recent decisions, has relied upon the Pennsylvania ERA in order to extend to men and women various rights previously held exclusively by the opposite sex.³⁵ For example, in *Hopkins v. Blanco*,³⁶ the court was again faced with a wife's demand for recovery for loss of consortium.³⁷ This time, however, it declined to follow the *Neuberg* court's refusal to extend such a right of recovery to wives; instead, the *Hopkins* court extended that right to wives based on the requirement that there be equality of the sexes as established by the Pennsylvania ERA.³⁸

Similarly, the Pennsylvania Supreme Court, in *DiFlorido v. DiFlorido*,³⁹ ruled that household furnishings and other nontitled prop-

33. PA. STAT. ANN. tit. 48, §§ 32.1-92 (Purdon 1965). The Married Women's Acts define the substantive rights of married women vis-à-vis the world in general and the husband in particular. *Id.* Areas covered by the statute include the following: property and contract rights, *id.* § 32.1; entitlement to separate earnings, *id.* § 34; transfer of loans and stock, *id.* § 36; control over property for purposes of trade, *id.* §§ 41-44; sale of land by absent husband, *id.* § 61; debts contracted for support of family, *id.* § 63; and disputes regarding child custody, *id.* § 92.

34. PA. CONST. art. 1, § 28. The text of ERA states: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." *Id.* For a discussion of the Pennsylvania ERA, see generally Momjian, *Family Law and the Pennsylvania Equal Rights Amendment, Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 677 (1980).

35. See, e.g., *Butler v. Butler*, 464 Pa. 522, 527-28, 347 A.2d 477, 480 (1975) (holding that contributions by either spouse toward purchase of entireties property are presumed to be a gift to the other spouse, contrary to previous presumption that when a husband obtained wife's property without adequate consideration a constructive trust was created in her favor); *Henderson v. Henderson*, 458 Pa. 97, 101-02, 327 A.2d 60, 62 (1974) (support not dependent upon sex, but rather upon the financial need of the parties); *Conway v. Dana*, 456 Pa. 536, 539-40, 318 A.2d 324, 326 (1974) (support of minor children is the equal responsibility of both husband and wife and support order must take into account assets of both parents, not just the father). For a more detailed discussion of these decisions, see Momjian, *supra* note 34, at 677-78, 685-86, 692-93.

36. 457 Pa. 90, 320 A.2d 139 (1974).

37. *Id.* at 91, 320 A.2d at 139.

38. *Id.* at 94, 320 A.2d at 141. The court declared:

We agree that if the husband may recover for loss of consortium, to deny the wife an equal right would be invalid under the Pennsylvania Constitution. To draw such a distinction would have no rational or proper foundation at law, and would clearly be a form of invalid discrimination based strictly on sex. It would also be unfair. Today a husband and wife are equal partners in a marital relationship, and, as such, should be treated equally under the law with respect to that relationship.

Id. at 93, 320 A.2d at 140. The Pennsylvania Supreme Court recognized that, alternatively, it could have eliminated the husband's right of recovery for loss of consortium, but, contrary to the majority in the *Neuberg* case, the majority in *Hopkins* believed that a husband should continue to recover for the loss. *Id.* at 93-94, 320 A.2d at 141. For other post-*Neuberg* decisions upholding the husband's right to recover for loss of consortium, see *Link v. Highway Express Lines, Inc.*, 444 Pa. 447, 452, 282 A.2d 727, 729-30 (1971); *Brown v. Philadelphia Transp. Co.*, 437 Pa. 348, 351, 263 A.2d 423, 424-25 (1970) (affirmance by an equally divided court).

39. 459 Pa. 641, 331 A.2d 174 (1975).

erty are presumed to be jointly owned, irrespective of who purchased the items.⁴⁰ In so holding, the *DiFlorido* court reversed the common law presumption that such property was owned by the husband⁴¹ and recognized the nonmonetary contributions of both spouses to the marriage.⁴²

The major sexist doctrine remaining from common law which has yet to be eradicated is the principle that the choice of the marital domicile is the husband's.⁴³ Under this theory, if the wife refuses to move with the husband, her obstinence constitutes an act of desertion.⁴⁴

2. Child as Property

Traditionally, children had few rights in the area of family law. They had no right to counsel in any proceedings for they were presumed to be represented by their parents and the state in the person of the judge.⁴⁵ Recently, the issue of the child's right to counsel has come to the forefront due to a growing awareness that the legal protection of children can be overlooked in actions brought by litigating parents or conducted under the pressure of clogged court dockets.⁴⁶

The right to counsel for children depends on the nature of the proceeding. In proceedings under the Juvenile Act, the right is established by statute.⁴⁷ Under the Adoption Act,⁴⁸ however, no such right presently exists⁴⁹ although pending legislation would mandate

40. *Id.* at 649-50, 331 A.2d at 179.

41. *See, e.g., In re King Estate*, 387 Pa. 119, 127-28, 126 A.2d 463, 467 (1956) (presumption can be overcome by sufficient evidence of wife's ownership); *Dura Seal Prods. Co. v. Carver*, 186 Pa. Super. Ct. 425, 426, 140 A.2d 844, 845 (1958) (presumption exists whenever the husband and wife are living together and jointly using the household goods).

42. 459 Pa. at 650-51, 331 A.2d at 179-80.

43. *See, e.g., Pochiba v. Pochiba*, 254 Pa. Super. Ct. 134, 135, 385 A.2d 562, 562 (1978) (*per curiam*); *Smith v. Smith*, 235 Pa. Super. Ct. 286, 288-89, 340 A.2d 552, 553 (1975); *Santarsiero v. Santarsiero*, 231 Pa. Super. Ct. 286, 288, 331 A.2d 868, 869 (1974). *See also* Momjian, *supra* note 34, at 688-89.

44. *See* authorities cited note 43 *supra*.

45. *See* Foster & Freed, *Child Custody*, 39 N.Y.U. L. REV. 423 (1964); Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151 (1974). For further discussion of this presumption and the problems associated with its application, *see* Bertin & Anthony Klein, *Pennsylvania's Developing Child Custody Law, Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 752, 771-74, 775-76 (1980).

46. *See, e.g., Bertin & Anthony, supra* note 45, at 771-74, 775-76; Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976); Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971); Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976).

47. 42 PA. CONS. STAT. ANN. § 6337 (Purdon 1980).

48. PA. STAT. ANN. tit. 1, §§ 101-603 (Purdon 1964 & Supp. 1979).

49. *See In re Kapcsos*, 468 Pa. 50, 59, 360 A.2d 174, 178 (1976). In *In re Kapcsos*, the Pennsylvania Supreme Court observed that both the natural parent and the state purport to represent the child in proceedings to terminate parental rights, and that the court is also required to represent the interests of the child. *Id.* at 58, 360 A.2d at 178. Although it noted the

legal representation for children in all adoption cases, especially where a natural parent's rights are being terminated.⁵⁰

Historically, the "tender years" presumption gave the mother almost the equivalent of a property right in her children.⁵¹ This doctrine provided that children under fourteen years of age were presumed to belong with the mother, unless she was proven to be unfit.⁵² Gradually, this presumption was eroded⁵³ until it was essentially abrogated in *Commonwealth ex rel. Spriggs v. Carson*,⁵⁴ wherein the Pennsylvania Supreme Court stated:

We also question the legitimacy of a doctrine that is predicated upon traditional or stereotypic roles of men and women in a marital union. Whether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling contrary evidence of a particular nature, or merely as a makeshift where the scales are relatively balanced, such a view is offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction.⁵⁵

As the concept of the child as property vanishes from our law, courts, in an effort to focus on the child's *best interests*, have increas-

suggestion of many commentators that counsel for the child would be beneficial in custody and adoption proceedings, the court was unable to find a constitutional right to such representation. *Id.* at 59, 360 A.2d at 178. The appointment of counsel was found to be discretionary with the lower court when "such representation is necessary or beneficial." *Id.* But see *id.* at 62-63, 360 A.2d at 180 (Manderino, J., dissenting) (children have independent interests and deserve independent representation; court should exercise supervisory rulemaking powers to require counsel for children). For a discussion of the right to counsel in child custody cases, see Bertin & Anthony Klein, *supra* note 45, at 771-74, 775-76.

50. S. 236, Pa. Senate, 1979 Sess. § 348(a); H. 213, Pa. House, 1979 Sess. § 2313; H. 450, Pa. House, 1979 Sess. § 343.

51. This doctrine was first established in Pennsylvania in *Commonwealth v. Addicks*, 5 Binn. 520, 521 (Pa. 1813).

52. See, e.g., *Commonwealth ex rel. Lucas v. Kreischer*, 450 Pa. 352, 355, 299 A.2d 243, 245 (1973); *Commonwealth ex rel. Fox v. Fox*, 216 Pa. Super. Ct. 11, 13, 260 A.2d 470, 470-71 (1969); *Commonwealth ex rel. Logue v. Logue*, 194 Pa. Super. Ct. 210, 215-16, 166 A.2d 60, 63-64 (1960).

53. For a discussion of the principle that the tender years doctrine is not absolute and can be overcome by facts showing that its application would not be in the best interest of the child, see *Commonwealth ex rel. Parikh v. Parikh*, 449 Pa. 105, 296 A.2d 625 (1972); *Commonwealth ex rel. Rainford v. Cirillo*, 222 Pa. Super. Ct. 591, 296 A.2d 838 (1972). For a review of the developing case law, see A. MOMJIAN & N. PERLBERGER, PENNSYLVANIA FAMILY LAW § 5.1.1 (1978); Bertin & Anthony Klein, *supra* note 45, at 753-55.

54. 470 Pa. 290, 368 A.2d 635 (1977) (plurality opinion). Although *Spriggs* involved a plurality opinion, lower courts have read the decision as abrogating the tender years doctrine. See *McGowan v. McGowan*, 248 Pa. Super. Ct. 41, 374 A.2d 1306 (1977); *Commonwealth ex rel. Lee v. Lee*, 248 Pa. Super. Ct. 155, 374 A.2d 1365 (1977). See also Bertin & Anthony Klein, *supra* note 45, at 754-55.

55. 470 Pa. at 299-300, 368 A.2d at 639-40 (citations omitted).

ingly permitted the child to express his or her preference regarding custody arrangements.⁵⁶ Nevertheless, children frequently remain pawns in divorce cases and are used mercilessly by their parents.⁵⁷ Custody and visitation demands are often presented for obvious strategical purposes, without a sincere intention or desire on behalf of the parent to secure the requested rights.⁵⁸ Children are utilized as weapons by parents who withhold access to them, engage in outright abduction of them and/or instill in them hostile feelings toward the other parent.⁵⁹ Practitioners must see the children as persons, not property, and refuse to aid parents in pressing vindictive, baseless claims or engaging in harmful tactics.

B. *The Nature of the Marital Estate*

Pennsylvania recently enacted a divorce law which converted the Commonwealth from a common law to an equitable distribution state.⁶⁰ Under the Pennsylvania common law approach, property owned by a married person was subject to post-divorce partition according to title.⁶¹ All jointly owned property was required to be divided equally, irrespective of who the purchaser was.⁶² The divorce converted a jointly owned estate into a tenancy in common entitling either spouse to partition.⁶³ Once partition had taken place, inequality in the estates of the parties could not be considered.⁶⁴ If all of the property was titled in the name of one of the parties, there was nothing to partition and, hence, the property remained the sole and separate property of the owner. Property titled separately was

56. See, e.g., *Commonwealth ex rel. Grillo v. Shuster*, 226 Pa. Super. Ct. 229, 237-38, 312 A.2d 58, 63 (1973); *Commonwealth ex rel. Morales v. Morales*, 222 Pa. Super. Ct. 373, 376, 294 A.2d 782, 783 (1972).

57. See Kaslow, *supra* note 1, at 731-32.

58. See *id.*

59. See *id.*

60. See DIVORCE CODE, Act No. 1980-26, §§ 401-404, 1980 Pa. Legis. Serv. 55-58 (hereinafter cited as DIVORCE CODE). For an in-depth discussion of the new Divorce Code, see Gold-Bikin & Rounick, *The New Pennsylvania Divorce Code, Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 617 (1980). For an analysis of the various property distribution systems utilized by American jurisdictions, see *id.* at 623-27 & nn. 51 & 64; Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 97-104 (1979); Morrissey, *A Pennsylvania Primer for Alimony and Equitable Distribution*, 47 PA. B.A.Q. 503, 503-14 (1976).

61. See PA. STAT. ANN. tit. 48, § 141 (Purdon 1965) (repealed 1980). PA. STAT. ANN. tit. 68, § 501 (Purdon Supp. 1979) (repealed 1980).

62. See PA. STAT. ANN. tit. 68, § 501 (Purdon Supp. 1979) (repealed 1980).

63. *Id.*

64. See *DeBernard v. DeBernard*, 384 Pa. 194, 197, 120 A.2d 176, 178 (1956).

not subject to division in the absence of fraud, duress, mistake, or undue influence.⁶⁵

The new Pennsylvania statute, however, provides that the court granting a decree of divorce or annulment shall, on the request of either spouse, "equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just,"⁶⁶ giving consideration to all relevant factors.⁶⁷ Marital property is defined as "all property acquired by either party during the marriage"⁶⁸ with certain specified exceptions, including property excluded by a valid agreement between the parties.⁶⁹ The statute includes a provision directing that title should be disregarded in the definition and distribution of marital property,⁷⁰ and provides for a presumption that all property acquired by either spouse during the marriage constitutes marital property.⁷¹ Additionally, the new law includes a provision for alimony, to be granted at the discretion of the court, but only if the party seeking the award lacks sufficient property after distribution to provide for his

65. *See id.*

66. DIVORCE CODE, *supra* note 60, § 401(d). For a detailed discussion of equitable distribution under the new Pennsylvania Divorce Code, *see* Gold-Bikin & Rounick, *supra* note 60, at 625-27.

67. The Divorce Code lists the following factors:

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training, or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits.
- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as a homemaker.
- (8) The value of the property set apart to each party.
- (9) The standard of living of the parties established during the marriage.
- (10) The economic circumstances of each party at the time the division of property is to become effective.

DIVORCE CODE, *supra* note 60, § 401(d).

68. *Id.* § 401(e).

69. *Id.* Other exceptions include 1) property acquired by gift or inheritance except for the increase in value during the marriage; 2) property acquired after separation and before the date of divorce; 3) property disposed of in good faith for value prior to the commencement of divorce proceedings; and 4) property to the extent it has been mortgaged or encumbered in good faith for value prior to the commencement of divorce proceedings. *Id.*

70. *Id.* § 401(f).

71. *Id.* The presumption may be overcome by evidence that it was acquired by one of the methods listed in § 401(e). *Id.* *See* note 69 and accompanying text *supra*.

or her reasonable needs and is unable to support himself or herself through employment.⁷²

IV. CHOOSING THE MEANS FOR PROPERTY DISTRIBUTION— THROUGH THE COURT OR BY CONTRACT?

The new Pennsylvania equitable distribution legislation provides for a more favorable division of assets than the common law,⁷³ especially when the assets are not jointly or proportionately owned.⁷⁴ The outcome in court is now less predictable, however, since all divisions are within the judge's sole discretion.⁷⁵

The alternative to litigating property division is the marital agreement, a vehicle favored by the courts since it lessens judicial involvement and represents a compromise satisfactory to the parties.⁷⁶ Agreements also avoid the inevitable hostilities of litigation and the airing of personal, and often embarrassing, facts.

Agreements are usually in writing. Courts have, however, enforced agreements entered into in open court⁷⁷ and oral agreements between authorized counsel which later could not be reduced to writing because of a subsequent change of mind on the part of a client.⁷⁸ When found to be valid, marital agreements are enforceable either at law in an assumpsit action or in equity in an action for specific performance.⁷⁹ Courts are also empowered to approve the agreement and incorporate it into the divorce decree.⁸⁰ In this way, the parties'

72. DIVORCE CODE, *supra* note 60, § 501(a). In determining the necessity of alimony, as well as the amount, duration and scope of the award, the court is directed to consider all relevant factors. Some of those identified in the statute include: 1) the relative earning capacities of the parties; 2) the ages and physical or mental conditions of the parties; 3) sources of income and expectancies or inheritances of either spouse; 4) the duration of, and standard of living during, the marriage; 5) the education and skills of the parties in terms of their employability, including consideration of whether employment would be inappropriate for a party with custody of a minor child; 6) the relative needs, assets, and liabilities of the parties; and 7) the marital misconduct of either party during the marriage excluding any period of separation subsequent to the filing of the divorce complaint. *Id.* § 501(b). For a detailed discussion of the alimony provisions of the new Pennsylvania Divorce Code, see Gold-Bikin & Rounick, *supra* note 60, at 628-29.

73. Compare notes 61-65 and accompanying text *supra* with notes 66-72 and accompanying text *supra*.

74. See note 65 and accompanying text *supra*.

75. DIVORCE CODE, *supra* note 60, § 401. Section 404 of the Divorce Code does require the court to express the reasons for the distribution of property which it orders. *Id.* § 404.

76. See Estate of Friedman, 483 Pa. 614, 626, 398 A.2d 615, 621 (1979).

77. See Bredt v. Bredt, 231 Pa. Super. Ct. 65, 69-70, 326 A.2d 446, 448-49 (1974).

78. See Springer v. Springer, 255 Pa. Super. Ct. 35, 38, 386 A.2d 122, 124 (1978).

79. See Exner v. Exner, — Pa. Super. Ct. —, 407 A.2d 1342 (1979).

80. See DIVORCE CODE, *supra* note 60, § 501(f); cf. Bredt v. Bredt, 231 Pa. Super. Ct. 65, 326 A.2d 446 (1974) (oral agreement between parties enforced by court as valid support order).

agreement becomes an order of the court and is enforceable as such.⁸¹

Except for matters of child custody and child support which are subject to modification if circumstances necessitate a change, all substantive terms agreed upon by the parties are enforceable.⁸² Property issues have been resolved by property settlements or separation agreements entered into *after* marriage and such contracts have been enforced.⁸³ In addition to these traditional post-marriage contractual resolutions, however, more and more parties are contracting *before* marriage in the form of antenuptial agreements.⁸⁴ If these agreements either evidence full and fair disclosure of the assets and income of the parties or are reasonable in their provisions, they are fully valid and binding.⁸⁵

Antenuptial agreements typically alter, determine, or extinguish the statutory rights of the surviving spouse in the estate of the deceased spouse.⁸⁶ They may also properly limit the amount, if any, of a spouse's support obligations and property claims in the event of separation or divorce.⁸⁷ Such agreements make it possible, there-

81. See DIVORCE CODE, *supra* note 60, §§ 501(f), 503. For the problems inherent in the contractual solution, see Gold-Bikin & Rounick, *supra* note 60, at 627.

82. See Lurie v. Lurie, 246 Pa. Super. Ct. 307, 311, 370 A.2d 739, 741 (1976).

83. See *id.*

84. See, e.g., Estate of Friedman, 483 Pa. 614, 398 A.2d 615 (1979); Hillegass Estate, 431 Pa. 144, 244 A.2d 672 (1968); McGannon v. McGannon, 241 Pa. Super. Ct. 45, 359 A.2d 431 (1976).

85. See, e.g., Estate of Friedman, 483 Pa. 614, 398 A.2d 615 (1979); Hillegass Estate, 431 Pa. 144, 244 A.2d 672 (1968). In *Friedman*, the Pennsylvania Supreme Court set forth the following standards for evaluating the validity of an antenuptial agreement:

(1) An Antenuptial Agreement is presumptively valid and binding upon the parties thereto.

(2) *The person seeking to nullify or avoid or circumvent the Agreement has the burden of proving the invalidity of the Agreement by clear and convincing evidence that the [other] spouse at the time of the Agreement made neither (a) a reasonable provision for the intended spouse, nor (b) a full and fair disclosure of his (or her) worth.*

(3) In evaluating the reasonableness of the provision for the [intended spouse], such reasonableness must be determined *as of the time of the Agreement* and not by hindsight. Reasonableness will depend upon the totality of all the facts and circumstances at the time of the Agreement, including (a) the financial worth of the intended husband; (b) the financial status of the intended wife; (c) the age of the parties; (d) the number of children each has; (e) the intelligence of the parties; (f) whether the [intended spouse] aided in the accumulation of the wealth of the [other] spouse; and (g) the standard of living which the [intended spouse] had before marriage and could reasonably expect to have during marriage.

(4) Full and fair disclosure does not require the disclosure of the *exact* amount of his or her property.

483 Pa. at 626-27, 398 A.2d at 621, quoting Hillegass Estate, 431 Pa. 144, 149-51, 244 A.2d 672, 675-76 (1968) (emphasis in original) (citations omitted).

86. See, e.g., Estate of Slight, 467 Pa. 619, 623, 359 A.2d 773, 775 (1976); Harrison Estate, 456 Pa. 356, 359, 319 A.2d 5, 7 (1974).

87. See Estate of Slight, 467 Pa. 619, 623, 359 A.2d 773, 775 (1976). The *Slight* court noted that, traditionally, agreements purporting to relieve a husband of his support obligation during

fore, to negotiate while the parties are unaffected by the pain and hostility of separation or divorce.

Similarly, prehabitation agreements—entered into by the parties in anticipation of living together without the benefit or thought of marriage—help to avoid the difficulties of property division by providing for a scheme of distribution *before* any bitterness has arisen between the parties. Prehabitation agreements concerning support and property division seek to protect persons living together against potential disputes upon break-up because, frequently, these relationships are of long duration and involve pooling the income and assets of two wage earners. These rather novel contracts are being utilized with increasing frequency as a result of the *Marvin v. Marvin* decision⁸⁸ which recognized both the viability of written and oral agreements in this area and the equitable roots of rights and liabilities resulting from cohabitation.⁸⁹

Thus, the problems associated with property disputes after separation may be lessened or entirely eliminated by either an antenuptial or a prehabitation agreement. In the absence of one of these documents, which many couples view as cold and calculated blueprints for the future demise of a marriage or relationship, the post-nuptial agreement or property settlement is eminently more favorable than the experience of the courtroom. Recognizing that agreements are not always possible, the practitioner may still claim a measure of success when the majority, if not the overwhelming predominance, of his cases end in settlement rather than court order.

V. TAX PITFALLS IN PROPERTY TRANSFERS

No discussion of property division can ignore the serious tax consequences of the sale and transfer of property. The practitioner should not forget, nor fail to appreciate, the tax significance of an agreement or court order. The transfer of ownership of any appreciated property from one spouse to the other results in a taxable

marriage have been viewed with suspicion since the obligation has been judged as one "imposed by law as an incident of the marital status and the legal unity of husband and wife." *Id.* at 623 n.6, 359 A.2d at 775 n.6, *quoting* Commonwealth *ex rel.* Roviello v. Roviello, 229 Pa. Super. Ct. 428, 435, 323 A.2d 766, 770-71 (1974) (citations omitted). Nevertheless, the court pointed out that "there is nothing to prevent a contractual agreement between a prospective husband and wife from speaking . . . to financial affairs during [the marriage], including a disavowal of the husband's duty of support." 467 Pa. at 623, 359 A.2d at 775 (footnote omitted).

88. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), *implemented on remand* 5 Fam. L. Rep. 3077 (Cal. Super. Ct. 1979).

89. 18 Cal. 3d at 673-85, 557 P.2d at 115-23, 134 Cal. Rptr. 824-32.

event increasing the gross income of the transferor.⁹⁰ The taxable gain is measured by the difference between the fair market value at the time of transfer and the adjusted basis of the property.⁹¹ The recipient of the property is deemed to have given equal value in settlement of the marital interests and does not realize any tax gain or loss.⁹² The timing of the transfer is also important. For example, transfers of real estate between husband and wife during the marriage are exempt from Pennsylvania real estate taxes;⁹³ however, transfers agreed upon prior to divorce, but actually occurring more than three months after divorce, result in transfer taxes for both parties.⁹⁴

The above discussion is necessarily simplistic since the tax aspects of separation and divorce are highly technical and applicable to many aspects of the dissolution of the marital relationship.⁹⁵ The practitioner is advised to become acquainted with the provisions of the Internal Revenue Code, together with the regulations and rulings applying these laws to given circumstances. Various sources are available for edification and consultation purposes.⁹⁶

VI. CONCLUSION

Issues concerning property division are complicated by the fact that, after realizing that divorce is inevitable, the parties often make the property involved the focus of a struggle. The struggle may represent a symbolic expression of insecurity, revenge, or unhappiness.

The ability of the attorney to negotiate effectively and arrive at a result pleasing to the client depends upon the strength of the client's factual position. The emotional condition of the client, the circumstances of the separation, the marital history, the financial situation, and the existence of children are all factors which vary the likelihood of success. The more residual pain that remains after separation, the more one can expect the property phase to be difficult and protracted. An understanding of the client's emotions and open communications are the essential ingredients for successful representation.

90. See *United States v. Davis*, 370 U.S. 65 (1962); I.R.C. § 1001.

91. See *United States v. Davis*, 370 U.S. 65, 71-74 (1962).

92. *Id.* at 72.

93. See PA. STAT. ANN. tit. 72, §§ 3284-3285 (Purdon Supp. 1980).

94. *Id.* The rate of tax is one per cent of the value of the property. *Id.* § 3285.

95. See, e.g., I.R.C. §§ 71, 215.

96. In addition to the federal statutory and regulatory materials, see, e.g., COMMERCE CLEARING HOUSE, INC., TAX PLANNING AND DIVORCE PREPARATION (Pamphlet No. 4844, 1975); A. MOMJIAN & N. PERLBERGER, *supra* note 60; Gutman & Sander, *Divorce and Separation*, TAX MNGM'T (BNA) No. 95-3rd (1975).

The legal issues are also extremely complex. The practitioner must carefully determine the extent of the actual and potential marital estate through verification of tax returns, bank statements, and other writings evidencing ownership or interest in assets, both personal and business. Both informal and formal discovery may be essential to meaningful property discussions. Decisions must be delicately and tactfully made regarding the advisability and timing of negotiations or litigation concerning the treatment of property and income pending a final decree in divorce. Alternative means, including antenuptial or prehabitation agreements as well as marriage counseling prior to separation, should be explored, if possible, in order to resolve potential or existing problems. If the practitioner is faced with a *fait accompli*, the least protracted approach should be sought.

In the final analysis, the client controls the decisionmaking aided by the attorney's guidance and advice on the legal and tax ramifications of the property settlement. As with most situations involving legal representation of this type, neither party is ever entirely satisfied with the attorney's effort. Perhaps the maxim is true that if both sides are unhappy with the result, equity has been obtained.